

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
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| NATIONAL LEGAL AND POLICY CENTER |) | FOIA Control Nos. 2010-026, 2010-027, |
| |) | 2010-028, 2010-098, and 2010-135 |
| On Request for Inspection of Records |) | |

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 2011**Released: May 20, 2011**

By the Commission: Commissioner McDowell dissenting and issuing a statement. Commissioner Baker not participating.

1. By this memorandum opinion and order, we deny an application for review filed by the National Legal and Policy Center (NLPC).¹ NLPC seeks review of a decision by the Office of General Counsel (OGC)² denying NLPC's request for a waiver of fees for processing two Freedom of Information Act (FOIA) requests, FOIA Control Nos. 2010-098 and 2010-135.³ We find that the staff correctly determined that NLPC is not entitled to a fee waiver. We also dismiss as moot NLPC's additional application for review of decisions by the Office of Managing Director (OMD) resolving NLPC's fee waiver requests in FOIA Control Nos. 2010-026, 2010-027, and 2010-028, because OMD did not deny the waiver requests in those cases. We emphasize that this decision addresses only fees for search and duplication costs as provided by the FOIA, not the public availability of any documents sought by NLPC, to the extent they exist.

I. BACKGROUND

2. In FOIA 2010-098, NLPC sought all records pertaining to the FCC website www.openinternet.gov; the parties, organizations, and persons involved in the initial design of the website; the ongoing maintenance of the website; the creation and maintenance of the website's architecture; the daily management of website content postings; the cost and expenses involved; and the parties, organizations, and persons who paid for any element of the website.⁴

3. In FOIA 2010-135, NLPC sought a variety of records, such as records of meetings or correspondence, regarding contacts between several Commission officials and several individuals outside

¹ See Letter from Kenneth Boehm, Chairman to Office of General Counsel (Jan. 12, 2010) (AFR).

² See Letter from Joel Kaufman, Associate General Counsel to Mr. Kenneth Boehm (Jan. 5, 2010) (Decision).

³ See Letter from Kenneth Boehm, Chairman to Federal Communications Commission (Nov. 13, 2009) (098 Request); Letter from Kenneth F. Boehm, Chairman to Federal Communications Commission (Dec. 7, 2009) (135 Request).

⁴ See 098 Request at 1-2.

the Commission.⁵ Members of the latter group included Ben Scott, the Policy Director of Free Press; certain personnel in the Democracy Alliance; Markham Erickson, an attorney representing the Net Coalition; Emmett O’Keefe, the director of public policy for Amazon.com; and Vint Cerf, Google Vice President & Chief Internet Evangelist. NLPC’s request also sought a copy of FCC Chairman Julius Genachowski’s daily schedule.

4. NLPC requested that the Commission waive the standard fees for processing these two FOIA requests pursuant to 47 C.F.R. § 0.470(e).⁶ That section provides for waiver of the standard fees “if disclosure of the information [requested] is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.”⁷ In addition to asserting that its requests would contribute to the public’s understanding of the influence of special interest organizations on the formulation of federal policy, NLPC stated that it is a non-profit corporation with a long history of exposing waste, fraud, and abuse in government and stated that it would disseminate any documents it acquires to the public through its website and through distribution to the media. NLPC also indicated that in the past it has provided material to Congress. Finally, NLPC stated that its requests were intended solely to further its efforts to promote accountability in government and would promote no personal financial interest.

5. In its Decision, OGC denied NLPC’s requests for a fee waiver. With respect to FOIA 2010-098, OGC rejected NLPC’s assertion that its request would contribute to the public’s understanding of the influence that special interest organizations have had or attempted to have on the Administration’s media and communications policy.⁸ The Decision noted that the www.openinternet.gov website was established to facilitate public discussion of issues relating to the future of the Internet and to disseminate information to the public regarding this issue. The Decision stated that OGC was unable to discern “how records concerning the creation and funding of this site will shed any light on the stated subject matter of the FOIA request” (*i.e.*, the influence that special interest organizations have in the formulation of the Administration’s media and communications policy).⁹ As to FOIA 2010-135, OGC found that NLPC had not indicated how the information sought in its request would “reveal additional or different information” than was provided in response to two earlier FOIA requests already made by NLPC.¹⁰ With respect to both the 2010-098 and 2010-135 Requests, OGC found that while NLPC had disseminated information to the public in the past, it had not given specific assurance in the present case indicating how it would disseminate the particular information sought in its Requests.¹¹ For these reasons, OGC denied the

⁵ See 135 Request at 1-2. Additionally, the request sought a copy of a draft report on broadband that was prepared by a private organization and referenced in e-mail correspondence. NLPC indicates that it requested these documents based on records it obtained from the Commission in response to two earlier NLPC FOIA requests, FOIA 2010-029 and 2010-033. See AFR at 1-2.

⁶ See 098 Request at 3-5; 135 Request at 3-6.

⁷ See also 5 U.S.C. § 552(a)(4)(A)(iii).

⁸ See Decision at 2.

⁹ See *id.*

¹⁰ See *id.* (citing NLPC FOIA requests 2010-029 and 2010-033). The current FOIA request states “[t]his Request references documents provided to [NLPC] by two letters . . . via FOIA Control No. 2010-[0]29 and 2010-033.” See 135 Request at 1. The earlier requests sought e-mail correspondence between Commission officials and individuals associated with Free Press and Google. See Letters from Kenneth [F.] Boehm to Federal Communications Commission (Oct. 8, 2009). As indicated in the current FOIA request, the Commission’s response to the earlier FOIA requests disclosed to NLPC that specific contacts (listed in the current request) had taken place between Commission officials and representative of various organizations, including those other than Google and Free Press.

¹¹ See Decision at 2.

request for a fee waiver, classified NLPC in the “all others” fee category, and estimated the fees for processing the two FOIA requests to be \$1,641.18 plus copying fees.¹²

6. In its application for review, NLPC reiterates its contention that the information requested will contribute to the public’s understanding of the influence of special interest organizations in government decision-making. With respect to FOIA 2010-098, NLPC states its belief that special interest groups played a role in the development of the www.openinternet.gov website and that this website, in turn, promotes Chairman Genachowski’s Open Internet initiative. NLPC argues that the public has a right to know whether special interests are assisting in efforts to promote the Chairman’s policies and whether these interests are complying with laws regulating lobbying activities.¹³ As to FOIA 2010-135, NLPC denies that the information requested is redundant of the information disclosed in response to NLPC’s earlier requests. NLPC asserts, for example, that the previously disclosed information revealed that meetings took place, and the present request seeks to reveal the matters discussed at those meetings.¹⁴

7. NLPC maintains that it has given the Commission adequate assurance that it will disseminate the requested information to the public. NLPC states that its various FOIA requests are “incremental,” in the sense that no particular request is intended to be complete in itself, and that it will disseminate the information received once it is “satisfied” that all relevant matters have been disclosed in response to all such requests.¹⁵ NLPC states that there is no requirement that information obtained through the FOIA must be disseminated to the public immediately in order for the requester to qualify for a fee waiver.¹⁶ In this regard, NLPC once again reviews its past efforts to inform the public about various matters.¹⁷ Finally, NLPC observes that agencies should not assess FOIA fees in order to discourage requests for information.¹⁸

II. DISCUSSION

A. Application for Review

8. We find that NLPC has not demonstrated its entitlement to a fee waiver under the FOIA. Accordingly, there is no basis for crediting NLPC’s assertion that OGC denied the requested waiver as a means of discouraging requests for information. As noted, the applicable section of the FOIA rules provides that a waiver of FOIA fees may be granted if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”¹⁹ Thus, to qualify for a fee waiver, the requester must demonstrate specifically how disclosure of the materials sought will contribute significantly to the public’s understanding of the operations or activities of the government. Furthermore, “the burden for satisfying the public interest standard” rests on the requester²⁰

¹² See *id.* at 3.

¹³ See AFR at 2-3.

¹⁴ See *id.* at 1-2.

¹⁵ See *id.* at 3.

¹⁶ See *id.*

¹⁷ See *id.* at 4.

¹⁸ See *id.*

¹⁹ 47 C.F.R. § 0.470(e); see also *id.* § 0.470(c) (fee waiver request must include a statement “explaining with specificity” the reasons demonstrating why requester qualifies for waiver).

²⁰ *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (citations omitted); accord, *Judicial Watch, Inc. v. United States Dep’t of Justice*, 185 F. Supp. 2d 54, 60 (D.D.C. 2002) (*Judicial Watch III*).

and “requests for public interest fee waivers must be reasonably detailed and specific.”²¹ “Conclusory statements that the disclosure of the requested documents will serve the public interest are not sufficient to meet this burden.”²² Thus, the courts have rejected as insufficient vague and unsubstantiated assertions of a public interest benefit that “merely restate [the requester’s] organizational mission”²³ or rely on speculation.²⁴

9. On this record, NLPC has failed to meet its burden of showing its entitlement to a fee waiver for either of its FOIA requests. Regarding FOIA 2010-098, NLPC states that there may be documents showing outside input into the creation of www.openinternet.gov, and that such input would contribute significantly to public understanding of “the influence that special interest organizations have had, or attempted to have, on the administration in formulating the administration’s media and communications policy.”²⁵ NLPC, however, identifies no evidence that “special interest organizations” actually had any input into the website. Rather, NLPC simply asserts:

We have reason to believe that the very same special interest groups whose representatives have been meeting with public officials at the Federal Communications Commission . . . also played a role in the development of the [openinternet.gov](http://www.openinternet.gov) website.²⁶

NLPC does not specify the basis for this assertion. Nor does it explain how, even if the alleged input into the website actually occurred, that input influenced “formulat[ion] [of] the administration’s media and communications policy.”²⁷ Mere speculation that the requested material might disclose a matter of public interest is insufficient to satisfy NLPC’s statutory burden in establishing its entitlement to a fee waiver.²⁸

²¹ *Judicial Watch III*, 185 F. Supp. 2d at 60.

²² *Id.* at 60 (citing *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987)).

²³ *See id.* at 61 (organization stated “in general terms” that it would use the requested information “(1) ‘to promote accountable government,’ (2) for the public’s benefit ‘by identifying areas for future reform as well as deterring future abuses that could otherwise proliferate without scrutiny,’ and (3) ‘for promoting confidence in an honest democratic system, and furthering the integrity of the American national government by deterring and/or sanctioning corrupt activities.’”).

²⁴ *VoteHemp, Inc. v. DEA*, 237 F. Supp. 2d 55, 61 (D.D.C. 2002) (rejecting as “rank speculation” requester’s claim that records of the Drug Enforcement Administration would contribute significantly to the public understanding of government operations by revealing the agency’s alleged “ulterior motive” for adopting a rule); *see also D.C. Technical Assistance Org., Inc. v. United States Dep’t of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (rejecting as lacking “any basis in reality” requester’s claim that records regarding a housing program would demonstrate that the agency sought to dismantle the program in “bad faith”).

²⁵ *See* 098 Request at 2-3.

²⁶ *See* AFR at 2.

²⁷ *See* 098 Request at 2-3.

²⁸ *See Judicial Watch III*, 185 F. Supp. 2d at 61; *VoteHemp*, 237 F. Supp. 2d at 61; *D.C. Technical Assistance Org.*, 85 F. Supp. 2d at 49. *Citizens for Responsibility and Ethics in Washington v. United States Dep’t of Health and Human Servs.*, 481 F. Supp. 2d 99 (D.D.C. 2006), is not to the contrary. In that case, the district court granted a fee waiver based on its conclusion that information concerning contacts between HHS and public affairs firms would reveal meaningful information about the government’s decision-making process. In particular, the court noted “wide public attention given to government agencies’ use of . . . other media products created by public affairs firms to promote certain policies of this Administration.” *Id.* at 108. In that light, the court found that the request for information was reasonably specific because the requester sought “records reflecting contracts HHS, a government agency, formed with public affairs firms” and HHS had conceded that “such contracts are part of [its] ‘routine

10. With respect to FOIA 2010-135, NLPC similarly conjectured that the requested information

is ‘likely to contribute to the public’s understanding of the influence that special interest organizations have had, or attempted to have, on the administration in formulating the administration’s media and communications policy,’ as our request indicated.... The public is entitled to know how public officials interact with representatives of special interests, along with the substance of those interactions, so that conclusions may be drawn about the positive or negative value of those interests on public policy. The information sought in our FOIA requests is intended to cast light on those types of interactions.²⁹

Thus, NLPC again failed to carry its burden by offering “reasonably detailed and specific”³⁰ information to show how its requests will “contribute significantly to the public understanding of the operations or activities of the government.”³¹ Moreover, NLPC has already received documents that disclose the existence of the specific contacts about which it seeks further information. The mere fact that such contacts took place is insufficient to justify a fee waiver. Parties on all sides of issues in Commission proceedings often contact the Commission. *Ex parte* presentations—that is, presentations directed to the merits or outcome of a proceeding that are not served on all parties (if the presentation is written) or are made without allowing the parties to be present (if oral)—are subject to comprehensive regulation by the Commission.³² Under the FCC’s rules, parties are required to file written *ex parte* presentations or summaries of matters discussed in oral *ex parte* presentations in “permit-but-disclose” proceedings, and *ex parte* communications are restricted in other contexts.³³ NLPC has provided no reason to believe that further information about the contacts here would disclose a form or degree of influence that is in any way significant or of public interest—much less one that would “contribute significantly” to the public understanding of government operations.³⁴

B. NLPC’s Additional Application for Review

11. On April 7, 2010, NLPC filed a letter³⁵ addressing the Managing Director’s April 1, 2010 responses to three additional FOIA requests, FOIA Nos. 2010-026, 2010-027, and 2010-028. In each of the responses, the Managing Director classified NLPC as a “representative of the news media” and found

administrative’ activities.” *Id.* at 107. Here, by contrast, NLPC has not identified any basis for concluding that the organizations it identified had any involvement in the development of the www.openinternet.gov website, much less that the construction of the website (as distinct from the Commission’s substantive open Internet policy) is a matter of “wide public attention.”

²⁹ AFR at 2.

³⁰ *Judicial Watch III*, 185 F. Supp. 2d at 60.

³¹ 47 C.F.R. § 0.470(e).

³² See 47 C.F.R. §§ 1.1200-1.1216.

³³ See *id.* §§ 1.1206 (permit-but-disclose proceedings), 1.1208 (restricted proceedings); see also *id.* § 1.1204 (proceedings exempt from *ex parte* filing requirements).

³⁴ *Id.* § 0.470(e).

³⁵ See Letter from Kenneth F. Boehm, Chairman to Joel Kaufman, Associate General Counsel (Apr. 7, 2010) (Contingent AFR). We refer to NLPC’s application for review as “contingent” because, as we explain *infra*, it is expressly contingent on whether the decisions below are construed as denials of NLPC’s fee waiver requests.

that no fees had accrued in connection with the request.³⁶ In the Contingent AFR, NLPC states that “To the extent the conclusions regarding [NLPC’s fee] classification constitute a denial of its fee waiver requests, [NLPC] hereby appeals that decision.”³⁷ NLPC further notes that its classification as a “representative of the news media” in the April 1 Letters is inconsistent with its classification as an “all others” requester in the OGC decision.³⁸

12. In the April 1 Letters, the Managing Director determined merely that NLPC had accrued no fees as a result of the three FOIA requests; accordingly, he did not address NLPC’s fee waiver requests.³⁹ Because NLPC’s requests for a fee waiver were not denied, we will dismiss the Contingent AFR as moot.⁴⁰

III. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that the Application for Review filed on January 12, 2010 by the National Legal and Policy Center in connection with FOIA Nos. 2010-098 and 2010-135 IS DENIED. The NLPC may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).

14. IT IS FURTHER ORDERED that the Application for Review filed by NLPC on April 7, 2010 in connection with FOIA Nos. 2010-026, 2010-027, and 2010-028 IS DISMISSED as moot.

15. By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁶ See Three Letters from Mindy Ginsburg, Deputy Managing Director to Kenneth F. Boehm, Chairman (Apr. 1, 2010) (April 1 Letters).

³⁷ See Contingent AFR at 1.

³⁸ See Decision at 2.

³⁹ See generally 47 C.F.R. § 0.470(e)(5) (if no fees or *de minimis* fees would result from a FOIA request, OGC will not reach a determination on a waiver or fee reduction request).

⁴⁰ In its application for review of FOIAs 2010-098 and 2010-135, NLPC expressly declined to address OGC’s classification of NLPC as an all others requester. NLPC stated “[y]our conclusion that [NLPC] should be categorized as an ‘all others’ requester is irrelevant because [NLPC’s] request qualifies for a fee waiver under 47 C.F.R. § 0.470(e).” AFR at 4. See also Contingent AFR at 2. (“As previously stated . . . the FCC’s various classifications are irrelevant in light of [NLPC’s] entitlement to a fee waiver for all FOIA requests at issue”). NLPC may address this issue in response to subsequent action on its FOIA requests.

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

Re: *National Legal and Policy Center; On Request for Inspection of Records*, FOIA Control Nos. 2010-026, 2010-027, 2010-028, 2010-098, and 2010-135

I respectfully dissent from this Memorandum Opinion and Order (“Order”) because it takes an unnecessarily restrictive approach to the Freedom of Information Act (“FOIA”) fee waivers afforded under 5 U.S.C. § 552(a)(4)(A)(iii). That provision directs agencies to give certain FOIA requesters a full or partial fee waiver “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” In my view, the denial of the request by the National Law and Policy Center (“NLPC”) is not compelled by the statutory language or FCC implementing rules, 47 C.F.R. §§ 0.470(a)(2) and 0.470(e).

There is no dispute here with respect to the requester’s status as a nonprofit foundation or its history as a self-appointed government watchdog which uses its own website, among other outlets, to disseminate information to the public about government activities that the requester believes warrant public attention. The Order’s outcome turns, essentially, on a determination that the requester was not specific enough about what it expected to find or how that information, if found, would contribute to the public’s understanding of FCC operations.

This result is troubling in several respects. Not the least of these is that the Order puts the Commission in the constitutionally awkward position of deciding whether the subject of a FOIA request is one of “wide public attention” – *i.e.*, newsworthy – or not. Moreover, in an era in which the Commission itself has been at the forefront of recognizing and tracking the roiling of traditional news media business models and the rise of new sources of information, it seems inconsistent for us to continue to insist on a sharp distinction in the context of FOIA fee waivers between a “news media” requester, for whom fee waivers are practically automatic, and other requesters who fulfill the same information-dissemination function but do not fit within the traditional rubric.

I would have preferred that the Order follow the philosophy of statutory construction set forth in *Citizens for Responsibility and Ethics in Washington v. United States Dep’t of Health and Human Services*, 481 F. Supp. 2d 99 (D.D.C. 2006). Such an approach also would be in keeping with President Obama’s January 2009 directive on FOIA. *See* Executive Office of the President, “Freedom of Information Act,” 74 Fed. Reg. 4683 (Jan. 21, 2009). Although not specifically addressed to fee waivers, the Presidential Memorandum states that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” Construing the statute to recognize the effect of FOIA costs on nonprofit government watchdog entities would be consistent with that spirit.

I appreciate the work of the Office of the General Counsel to address my concerns. Although I could not in the end vote for the Order, I thank the OGC staff for improving upon the original draft by clarifying the standard that nonprofit requestors must satisfy in order to obtain a fee waiver.